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No. 98-682

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

BOUCHARD TRANSPORTATION COMPANY, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eleventh Circuit

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RESPONSE IN OPPOSITION TO BOUCHARD'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

[as framed by Petitioner]

I. Whether district courts exercising their admiralty and maritime jurisdiction should apply the procedure of Supplemental Rule F to implement the limitation of liability provisions of the Oil Pollution Act of 1990 (OPA 90).

II. If not, whether this Court will make the rules needed to fill the resulting procedural void as it did in a similar situation in Norwich v. Wright, 80 U.S. (13 Wall.) 104, 125 (1871).

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Oil Pollution Act of 1990 [OPA 90] ..... *passim*

Supplemental Rule F, Fed.R.Civ.P. 6

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STATEMENT OF THE CASE

Preliminarily, Respondent, the Florida Department of Environmental Protection (DEP), has filed a separate petition for certiorari seeking review of the decision below. DEP seeks review of the ruling that the Eleventh Amendment does not bar compelling a state into admiralty court through the Limitation of Liability Act. Otherwise, DEP accepts Petitioners' statement with the following clarifications.

Petitioners Bouchard and Maritrans make no mention of their counterclaims against DEP, which were dismissed without prejudice. (*See* petitioners' app., p. 24) Together, these counterclaims seek damages of more than $150 million, due to Florida's alleged negligence, etc.[1] Based on the gross tonnages of their respective tank barges, Bouchard and Maritrans concurrently seek to limit their liability under OPA 90 (oil spill damages) to about $28.7 million. *(See* petition, p. 9, n. 4.) For other claims, Bouchard and Maritrans stipulated to vessel and cargo values totaling $13.2 million.

All Petitioners (the "vessel owners") state categorically that the district court's order "did not affect claims to the extent they were based on the general maritime law and on Florida common law, which are subject to limitation under the 1851 Limitation Act." (*See* petition, p 7.) This statement is incorrect. The district court also granted DEP's motion to dismiss on Eleventh Amendment grounds. Therefore, Florida could not be compelled to press its claims in federal court. Claims lodged by DEP would not necessarily go forward "in any event," as the vessel owners depict. Again, the Eleventh Circuit's reversal of this ruling is the subject of DEP's separate petition for certiorari.

REASONS FOR DENYING THE WRIT

I. The Question of Law Decided Below Is Not "Important" For Purposes Of Certiorari Review, And Does Not Need To Be Settled By This Court.

Despite their effort to tell this Court why the decision below was wrong, the vessel owners devote not one word to why

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[1]Bouchard's counterclaims, alone seeking $75 million, are reproduced as appendix C of DEP's petition for certiorari. *See* pages 28-9 of that appendix.

immediate review by certiorari is appropriate. This lapse is perhaps explained by the express rationale of the decision below. In reaching its holding that claims under the federal and Florida oil spill laws were not subject to the Limitation Act, the Eleventh Circuit correctly treated the issue as one of statutory construction. *See* Bouchard Transp. Co., Inc. v. Updegraff, 147 F.3d 1344, 1347 & 1349-52 (11th Cir. 1998) (concluding OPA 90 "explicitly supersedes the Limitation Act's liability limits"and observing: "This conclusion is supported by principles of statutory construction.").

An issue of statutory construction simply does not possess the inherent importance as does, for example, the issue of Eleventh Amendment immunity. *See* Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.,506 U.S. 139, 146 (1993) (applying collateral order doctrine to orders denying 11th Amendment immunity, and observing that the "ultimate justification" for such application is "ensuring that the States' dignitary interests can be fully vindicated"). If, then, the vessel owners seek certiorari based on the importance of the federal question, they have utterly failed to establish the question is of sufficient importance to warrant immediate review.

As they did below, the vessel owners rely on a faulty premise. *See* Bouchard, 147 F.3d at 1350 ("[T]he Owners' theory is based on a false premise."). Here, the vessel owners assert they will be "left with a right but no procedure to enforce the right." (petition, p. 10) This statement is falsely premised on the assumption that there is a right to compel all claims under OPA 90 and Florida's oil spill law into a single proceeding against a single fund. Also, the owners have ignored the fact OPA 90's separate liability limits are available should DEP proceed in state court.

The vessel owners' fear of multiple lawsuits under OPA 90 is

not a ground for granting certiorari. Throughout the country, large accidents routinely spawn numerous lawsuits, not necessarily in a single forum. Congress accepted this possibility when it enacted separate procedures, outside the Limitation Act, for limiting liability under OPA 90.

Continuing this theme, the vessel owners contend they could face multiple lawsuits, each (instead of all) limited to the maximum liability under OPA 90, and thereby be faced with greater liability than Congress intended. (petition, p. 11-12) This point is speculative. It would not arise unless the damages obtained for all OPA 90 claims, in all lawsuits, exceeded both the vessel owners' maximum liability and the $1 billion reimbursement cap for the federal Oil Spill Liability Trust Fund. The claims in this case cannot possibly exceed $1 billion. Therefore, the Eleventh Circuit did not reach the issue, which should not be a basis for granting certiorari.[2] *See* Bouchard, 147 F.3d at 1350, n. 8 (declining to construe OPA 90 as creating a limited fund requiring proration of claims in a single proceeding, when there was "no allegation that the claims in this case pose any danger of exceeding the $1 billion cap.").

By writing OPA 90 the way it did, Congress favored compensation for those damaged by oil spills over the convenience of vessel owners. The decision below read OPA 90 correctly, and in accord with the First Circuit's interpretation of the same statute. The vessel owners do not show any particular importance or urgency in their first question. Certiorari is not justified.

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[2]Similarly, the Eleventh Circuit did not address the owners' speculation that vessels could be subjected to "multiple arrests or attachments."

II. The Decision Below Does Not Conflict With A Relevant Decision By This Court Or Another Circuit Court Of Appeals.

The vessel owners do not allege conflict between the decision below and relevant decisions of this Court. *See* Supreme Court Rule 10(c). At most, they occasionally cite to decisions by this Court for tangential points. For example, they cite to United States v. Bestfoods, __ U.S. __, 118 S.Ct. 1876 (1998), for the curious observation that polluters' rights deserve the same respect as victim's rights. (petition, p. 11)

The vessel owners also fail to allege any conflict between the decision below and a decision by another circuit court "on the same important matter." *See* Supreme Court Rule 10(a). To the contrary, the vessel owners (petition, p. 10) concede the decision below is in accord with a decision by the First Circuit, Metlife Capital Corp. v. M/V Emily S., 132 F.3d 818 (1st Cir.1997), *cert. denied*, __ U.S. __, 118 S.Ct. 2367 (1998). *See also*, Bouchard, 147 F.3d at 1350-51 (citing to Metlife). Effectively, the vessel owners are using their petition to express disagreement with the First Circuit also.

The second question is little more than variation upon the first: "Only when claims are marshaled into a single forum" will a vessel owner be able to limit liability. (petition, p. 12) The flaw of such logic is obvious. Congress, by providing other liability limits and procedures in OPA 90, and by preserving state oil spill laws, has established different public policy as law of the land. However desirable a *concursus* of a state's OPA 90 and state law claims in a single court may be to vessel owners, it was not sufficiently desirable to Congress for the law to be written as the vessel owners now wish. Whatever the merit of the vessel owners' position as a matter of public policy, that position is meritless as a ground for certiorari review.

In their last point, the vessel owners rely on the use of "statute" in Supplemental Rule F, Fed.R.Civ.P., as adopted in 1966. They claim "statute" indicates an intent by this Court to "expand the application of Supplemental Rule F beyond the 1851 Limitation Act." (petition, p. 15) Marginally, the vessel owners would portray this case as involving the construction of Rule F.

The owners do not intimate how--under separation of powers--this Court could adopt a procedural rule in 1966 which trumped a 1990 substantive law; that is, OPA 90. The express purpose of Rule F was to fill a void left by Congress when it adopted the original Limitation Act. As the decision below noted, there is no void to fill in OPA 90. *See* Bouchard, 147 F.3d at 1350 ("whereas the Limitation Act was enacted without procedural mechanisms, Congress expressly set forth procedures for implementing OPA 90"). Again, the vessel owners have raised a point does not justify granting certiorari.

III. Petitioners' Request For Rulemaking By This Court Is Not A Ground For Certiorari Review.

In the third question presented, the vessel owners contend their perceived need for rulemaking by this Court is a ground for certiorari review. They follow with a superfluous discussion of statutory provisions for promulgation of rules by this Court. They end with the undisputed but irrelevant observation that this Court, as the final arbiter of admiralty law, must have the authority to enact necessary rules. (petition, p. 18)

The vessel owners do not suggest how the need for new rules, if such need exists, supports the grant of certiorari. The exact opposite makes more sense. If there is a need for new rules, those rules should be proposed, circulated and developed nationally. They should not emerge from one factually unique

case, which is inherently adversarial rather than "legislative" in character.

Nothing in this Court's rules or jurisprudence indicates the need for quasi-legislative rulemaking justifies certiorari. The vessel owners' third ground for certiorari does not present a true "question," and is meritless.

CONCLUSION

Bouchard's petition for writ of certiorari should be denied.

Respectfully submitted,

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